No. 93-900

In the Supreme Court of the United States

OCTOBER TERM, 1993

DANIEL M. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly determined that petitioner's former attorney could be required to testify, pursuant to the crime-fraud exception to the attorney-client privilege, concerning prior communications with petitioner.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 1-10, is reported at 1 F.3d 606. The memorandum opinions of the district court, Pet. App. 13-27, 28-33, and 34-39, are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 11) was entered on August 5, 1993. A petition for rehearing was denied on October 12, 1993. Pet. App. 12. The petition for a writ of certiorari was filed on December 6, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury sitting in the Northern District of Illinois returned an indictment charging petitioner with one count of obstruction of justice, in violation of 18 U.S.C. 1503. The indictment alleged that petitioner had concealed a document during the course of a grand jury investigation. After the indictment was returned, the government subpoenaed Matthias Lydon, the attorney who had represented petitioner during the grand jury investigation that he was alleged to have obstructed. Pet. App. 1. Petitioner moved in limine to bar any questioning of Lydon, but the district court denied the motion, relying on the crime-fraud exception to the attorney-client privilege. *Id.* at 13-27. The court of appeals affirmed. *Id.* at 1-10.

1. Petitioner was the president of Special Operations Associates, Inc. (SOA), a security firm based in Chicago, Illinois. In 1986, two officers of SOA, James O'Grady and James Dvorak, were selected as Sheriff and Undersheriff of Cook County, Illinois. They resigned their executive positions with SOA but continued to hold stock in the company. Based on the recommendation of O'Grady and Dvorak, the Cook County Board of Commissioners (Board) awarded a services contract to Home Incarceration Systems of Northern Illinois, Inc. (HISNI). Although the only listed shareholder of HISNI was Audrey Tokarz, the government suspected that HISNI was a front for SOA, and that O'Grady and Dvorak had influenced the Board's decision for their own financial gain. Pet. App. 4.

In late 1989, a federal grand jury began an investigation into SOA and HISNI. In early January of 1990, petitioner was served with two subpoenas. The first subpoena requested petitioner, as president of SOA, to pro-

vide "any and all *ORIGINAL* records and *ORIGINAL* received correspondence * * * involving business and/or financial transactions" between SOA and Audrey Tokarz or HISNI. Pet. App. 4. On January 12, 1990, Lydon transmitted documents to the government under a cover letter indicating that no other documents covered by the subpoena existed. The second subpoena was directed to petitioner personally and requested "[a]ny and all *ORIGINAL* documents, checks and other records of any kind relating to financial, loan, and/or business transactions" between petitioner and Audrey Tokarz or HISNI. *Id.* at 5. On January 16 and February 1, 1990, Lydon delivered to the government documents requested by the personal records subpoena. *Id.* at 4-5.

On May 30, 1990, the government learned of an unsigned agreement between Tokarz, petitioner, and Michael Caccitolo, another SOA officer and shareholder. The agreement gave petitioner and Caccitolo the right to buy all of Tokarz's stock in HISNI at a prearranged price. Pet. App. 5-6. On that same day, petitioner was informed by Caccitolo that the government could be expected to learn of the agreement's existence. The next day, petitioner for the first time delivered a copy of the agreement to Lydon, and on July 13, 1990, Lydon transmitted the document to the government. *Id.* at 15-16 & n.2.

2. Petitioner was indicted on one count of obstruction of justice, in violation of 18 U.S.C. 1503. The indictment alleged that he had "concealed and intentionally failed to produce . . . in response to the grand juries' subpoenas" the agreement between himself, Caccitolo, and Tokarz. See Pet. App. 6. After the indictment was returned, the government subpoenaed Lydon and informed him of its intention to call him as a witness at petitioner's trial. Petitioner filed a motion in limine, asserting that the

attorney-client privilege barred any questioning of Lydon. The district court denied the motion. Under the crime-fraud exception (see *id.* at 17), the court explained, "[o]n-going misconduct, such as tricking one's attorney into providing false information to a grand jury during an investigation, is not protected by the attorney-client privilege." *Id.* at 26. The court concluded that the government had established a prima facie case of wrongdoing, *id.* at 20-25,[1] and that petitioner's "attempt to explain why this evidence does not indicate that he has waived his attorney-client privilege [is] not sufficient to uphold the attorney-client privilege." *Id.* at 26.

3. The court of appeals affirmed.[2] To invoke the crime-fraud exception, the court held, a party must produce evidence sufficient to establish a prima facie case of the crime or fraud. The court explained the evidentiary showing required to establish a prima facie case (Pet. App. 7 (internal quotation marks omitted)):

> [A] party has established a prima facie case whenever it presents evidence sufficient to require the adverse party, the one with superior access to the evidence and in the best position to explain things, to come forward with that explanation. * * * [I]f the district court finds such explanation satisfactory the privilege remains.

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[1] The court noted in particular that "[s]ince the unexecuted agreement could fall within the scope of the subpoena, whether [petitioner] wrongfully concealed it from government investigators is a question for the jury to decide." Pet. App. 20.

[2] The court held that it had jurisdiction to review petitioner's interlocutory appeal because the allegedly privileged communications had not yet been disclosed. Pet. App. 3-4 (citing *United States* v. *Calandra*, 706 F.2d 225 (7th Cir. 1983)).

The court concluded that the government had established a prima facie case because the concealed agreement was covered by the "plain language" of the first subpoena served on petitioner, and petitioner did not produce the agreement until after he learned that the government knew of its existence, more than four months after he claimed to have fully complied with the subpoena. Pet. App. 7-8 & n.7, 21. Petitioner "concede[d] that these circumstances require an explanation," but claimed that the agreement was not subject to the subpoena, and that he was not responsible for concealing it. *Id.* at 8. The court acknowledged that petitioner might ultimately prevail at trial but noted that "at this stage of the proceedings, the government need not prove its case. All that is needed is something 'to give color to the charge' that [petitioner] used Lydon as his agent in obstructing the grand jury's investigation." *Ibid.* The court concluded that the government had established a prima facie case that the communications with Lydon served to further petitioner's commission of a crime, and it held that Lydon could be called as a witness at petitioner's trial. *Id.* at 8-10.

ARGUMENT

Petitioner claims that the courts below applied the wrong standard of proof in concluding that the government had established a prima facie case under the crime-fraud exception to the attorney-client privilege. He contends that the courts of appeals are in conflict over that standard, and that "the showing deemed sufficient" by the courts below "would not have satisfied [the] more exacting standards established in other Circuits." Pet. 13. Although there is undoubtedly some disparity between the courts of appeals as to the precise formulation of the applicable standard, in practical effect the decisions are

in accord. Moreover, petitioner would not be entitled to relief under any formulation of the standard. Further review is therefore unwarranted.

1. The attorney-client privilege generally protects from disclosure confidential legal communications between an attorney and his client. See *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). However, the privilege does not apply to such communications when they are in furtherance of a crime or fraud—when they relate "not to prior wrongdoing, but to future wrongdoing." *United States* v. *Zolin*, 491 U.S. 554, 562-563 (1989) (internal quotation marks and emphasis omitted). To overcome the privilege under the crime-fraud exception, this Court has stated, a party must establish a "prima facie" case of crime or fraud—"something to give colour to the charge." *Clark* v. *United States*, 289 U.S. 1, 15 (1933) (internal quotation marks omitted).

2. As the Court recognized in *Zolin*, the "use * * * of the phrase '*prima facie* case' to describe the showing needed to defeat the privilege has caused some confusion. * * * The quantum of proof needed to establish admissibility was * * * and remains, subject to question." 491 U.S. at 563-564 n.7. The courts of appeals have adopted different formulations of the prima facie standard. The Second and Sixth Circuits have held that a prima facie case is equivalent to a showing of "probable cause to believe that a crime or fraud had been committed and that the communications were in furtherance thereof." *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1039 (2d Cir. 1984); see *In re Antitrust Grand Jury*, 805 F.2d 155, 165-166 (6th Cir. 1986) (adopting the Second Circuit's approach). Other circuits have described the test differently. See *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985) (party opposing the privilege must "offer[] evidence that if believed by the trier of fact would

establish the elements" of the crime or fraud); *Duplan Corp.* v. *Deering Milliken, Inc.*, 540 F.2d 1215, 1220 (4th Cir. 1976) (prima facie showing is "such as to subject the opposing party to the risk of non-persuasion if the evidence as to the disputed fact is left unrebutted"); *In re Int'l Sys. & Controls Corp. Sec. Litigation*, 693 F.2d 1235, 1242 (5th Cir. 1982) (following *Black's Law Dictionary* definition of prima facie case as "[a] case which has proceeded upon sufficient proof to that stage where it will support [a] finding if evidence to the contrary is disregarded"); *In re Grand Jury Investigation*, 842 F.2d 1223, 1226 (11th Cir. 1987) (prima facie case established by "showing of evidence that, if believed by a trier of fact, would establish the elements of some violation").[3]

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[3] In *In re Grand Jury Investigation*, 842 F.2d at 1226, the Eleventh Circuit stated that "a prima facie showing can be established by a good faith statement by the prosecutor as to what evidence is before the grand jury." In support of that statement, the court cited a case involving an affidavit concerning the information before a grand jury. *Ibid.* Thus, the court did not indicate that mere pleadings could establish a prima facie case, and its decision does not conflict with that of the Fifth Circuit in *In re Int'l Sys. & Controls Corp. Sec. Litigation*, 693 F.2d at 1242.

Contrary to petitioner's assertion (Pet. 11), the Eighth Circuit has not rejected the prima facie test applied in the other circuits. In *In re Murphy*, 560 F.2d 326, 338 (8th Cir. 1977), the court found that there was no prima facie case of crime or fraud because the defendants in the underlying criminal case previously had been cleared of any wrongdoing by the court of appeals and by the Federal Trade Commission, and the "evidence proffered by the Government * * * is ambiguous and controverted. It is not sufficiently convincing to support a prima facie case of fraud." Thus, the Eighth Circuit merely concluded, as a factual matter, that there was no prima facie case of crime or fraud. Nothing in the court's opinion suggests that it meant to depart from the evidentiary standards adopted by the other courts of appeals. Indeed, the court cited a case from the Second Circuit in describing the prima

As several courts of appeals have recognized, however, the differences between these formulations are largely semantic. See *In re Int'l Sys. & Controls Corp. Sec. Litigation*, 693 F.2d at 1242 n.11 (while Second Circuit's probable cause "phraseology is different, its approach was the same" as the dictionary test adopted by the Fifth Circuit); *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d at 1039 ("As a practical matter, there is little difference here between the two tests."); *In re Antitrust Grand Jury*, 805 F.2d at 165-166 ("there are not practical differences between the probable cause standard and the *prima facie* standards formulated in the circuits. Both require that a prudent person have a reasonable basis to suspect the perpetration of a crime or fraud") (citation and internal quotation marks omitted). Thus, the courts of appeals are substantially in accord as to the application of the prima facie standard.

3. The Seventh Circuit, we acknowledge, has framed the inquiry somewhat differently. That court has expressly rejected the "sufficient to support a verdict" standard, stating that "[t]he question here is not whether the evidence supports a verdict but whether it calls for inquiry." *In re Feldberg*, 862 F.2d 622, 625-626 (7th Cir. 1988). Under the Seventh Circuit's approach, however, the determination that a prima facie case has been established does not automatically lead to the revelation of communications that would otherwise be privileged. Rather, that determination "require[s] the adverse party, the one with superior access to the evidence

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facie showing required to overcome the attorney-client privilege. 560 F.2d at 337. More recent decisions from the Eighth Circuit also have approvingly cited cases from the other circuits. See *Pritchard-Keang Nam Corp.* v. *Jaworski*, 751 F.2d 277, 282 & 283 n.5 (1984), cert. dismissed, 472 U.S. 1022 (1985).

and in the best position to explain things, to come forward with that explanation. If the court finds the explanation satisfactory, the privilege remains." *Id.* at 626 (citations omitted). In the present case, petitioner is incorrect in arguing (Pet. 13) that "the showing deemed sufficient by the Seventh Circuit would not have satisfied more exacting standards established in other Circuits." In order to invoke the crime-fraud exception to the attorney-client privilege, the initial burden was on the government to "present[] evidence sufficient 'to require [petitioner] * * * to come forward with [an] explanation.'" Pet. App. 7. As petitioner conceded below, the government's evidence—which indicated that petitioner had "represented through [Lydon] that he had complied with the * * * subpoena when he knew that he had not"—satisfied this requirement. *Id.* at 8, 10. Having determined that the government's submissions were sufficient to require an explanation, the courts below afforded petitioner the opportunity to respond to the government's evidence. The courts ultimately concluded, however, that petitioner's explanations were inadequate. Thus, contrary to petitioner's assertion (Pet. 14), the decision of the courts below to permit questioning of petitioner's attorney was based on far more than "the judicial equivalent of a raised eyebrow."

As petitioner points out (Pet. 13), the court of appeals acknowledged that petitioner "might be right" in arguing that the document in question lay outside the scope of the initial subpoena. Pet. App. 8. Contrary to petitioner's contention, however, uncertainty as to the subpoena's coverage would not preclude questioning Lydon under the crime-fraud formulations employed by other circuits. The district court made clear that it regarded the question whether the document was covered by the subpoena as an issue for the jury. *Id.* at 20. Implicit in

the district court's analysis, moreover, is the conclusion that a reasonable jury could find that the document fell within the scope of the subpoena and that petitioner had breached his legal obligation to produce it. The court expressly declined to "rule as a matter of law that the [petitioner] was not required to turn over the unexecuted document with Tokarz," and stated that "[s]ince the unexecuted agreement could fall within the scope of the subpoena, whether the [petitioner] wrongfully concealed it from government investigators is a question for the jury to decide." *Ibid.* The court therefore would have permitted Lydon to be questioned at trial even if it had framed the inquiry as whether the evidence was sufficient to support a verdict. There is consequently no basis for petitioner's contention that the courts below would have reached a different conclusion if they had employed one of the verbal formulations used by other courts of appeals.[4]

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[4] By letter to petitioner's current counsel dated December 3, 1991, the government set forth three "illustrative questions" that it intends to ask Lydon at trial. Those questions are as follows:

> 1. Mr. Lydon, at any time prior to May 31, 1990, did Daniel M. Davis ever state to you or in your presence that there had never been any form of agreement pursuant to which Audrey Tokarz would be required to sell or transfer her shares in HISNI to any person or entity?
>
> 2. Mr. Lydon, when Daniel M. Davis provided you with records pursuant to the grand jury's subpoenas in this case, did he assure you that he had produced all extant relevant records?
>
> 3. Mr. Lydon, when Daniel M. Davis finally produced a copy of the Tokarz/Davis/Caccitolo "personal" HISNI-sale agreement on May 31, 1990, did he admit that he had previously lied to you about the non-existence of such an

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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agreement and about his compliance with the grand jury's subpoenas in this case?

The first two questions seek to elicit testimony regarding statements made by petitioner in furtherance of the alleged obstruction of justice, and in our view these questions clearly fall within the crime-fraud exception. The status of the third question is less certain. Admissions of prior wrongdoing could fall within the crime-fraud exception if they were part of an ongoing course of misconduct (*e.g.*, if petitioner admitted to Lydon that he had previously lied about the document in the course of his effort to persuade Lydon to continue to conceal its existence). We note in this regard that the document in question was not transmitted to the government until July 13, 1990. Thus, although petitioner delivered a copy of the agreement to Lydon on May 31, 1990, it is by no means clear that petitioner's criminal conduct ceased as of that date. Admissions of prior wrongdoing would be privileged, however, if made after petitioner's efforts to obstruct justice had ceased. At trial, the district court will of course be able to limit the examination of Lydon to questions pertaining to statements made by petitioner in furtherance of the crime or fraud.